IN THE

Supreme Court of the United States

OCTOBER TERM 1969

~~319~~ 1

No. .....

RICHARD W. CROUGHAN,

Petitioner,

against

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

DENIS M. HURLEY,
Counsel for Petitioner,
32 Court Street,
Brooklyn, N. Y. 11201.

JOHN F. HAGGERTY,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	7
1. The decision below is believed to be erroneous and appears to conflict with the decision of this Court in *Re Ruffalo*, 390 U. S. 544, 20 L. Ed. 2d 117, reh. den. 391 U. S. 961, 20 L. Ed. 2d 874 (1968)	7
2. Since the questions of solicitation were turned over to the District Attorney of Queens County for presentment to the grand jury and no indictment ever issued, was not the Police Departmental trial thereafter restricted from adjudicating the solicitation issue?	9
3. The finding that petitioner had violated a Rule and Regulation of the Police Department which was not promulgated until nearly a year after the alleged commission of the offense violates the due process clause of the 5th and 14th Amendments	10
4. The dismissal of petitioner from the Police Force was an unconstitutional selective enforcement of an administrative regulation	11
Conclusion	13

PAGE

Appendix A—Order of the New York City Police Commissioner 14

B—Order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department 16

C—Order of the Court of Appeals of the State of New York denying leave to appeal 18

CITATIONS

Cases:

Re Ruffalo, 390 U. S. 544, 20 L. Ed. 2d 117, reh. den. 391 U. S. 961, 20 L. Ed. 2d 874 (1968) 7

Mahoning County Bar Assn. v. *Ruffalo,* 176 Ohio St. 263, 199 N. E. 2d 396 ..... 7, 9

O'Callahan v. *Parker,* No. 646—October Term, 1968, decided June 2, 1969 10

U. S. v. *Harriss,* 347 U. S. 612 (1954) 11

Matter of Fendel, 25 A. D. 2d 733 (First Dept. 1966) 12

Cox v. *Louisiana,* 379 U. S. 536 (1965) 12

Statutes:

New York Penal Law, Article 24 ..... 3, 9

Judiciary Law of New York, Section 90 3

General Municipal Law of New York, Section 208d 11

Miscellaneous:

Rules and Procedures, NYC Police Department, 2/35.00 ..... 6, 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. .....

RICHARD W. CROUGHAN,

Petitioner,

against

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court, Appellate Division, Second Judicial Department, entered on the 27th day of January, 1969. A motion for leave to appeal to the Court of Appeals of the State of New York was denied and was entered in this case on April 10, 1969.

Citations to Opinions Below

The order of respondent, dated May 18, 1964, dismissing petitioner from the Police Department of the City of New York, is printed in Appendex A hereto, *infra*, page 14.

The order of the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York, dated January 27, 1969, affirming the respondent and rendered without written opinion, is printed in Appendix B hereto, *infra* page 16. A motion for leave to appeal to the Court of Appeals of the State of New York was denied on April 10, 1969, and the said order is printed in Appendix C, hereto, *infra* page 18.

Jurisdiction

The order denying leave to appeal to the Court of Appeals of the State of New York was entered on April 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Is the dismissal of a police officer of the City of New York, after a departmental hearing, on the basis of a finding of guilty of an offense that was not pleaded against him nor charged against him and not added by way of amendment at the hearing a violation of his constitutional right of procedural due process?

2. Was the department trial of petitioner on a charge cognizable under the Penal Code of New York, which matter was turned over to the District Attorney for presentment and indictment and upon which an indictment was never returned, a deprivation of petitioner's constitutional rights to indictment by a grand jury and trial by a petit jury?

3. Whether the dismissal of a police officer of the City of New York on the basis of a finding of guilty of the violation of a rule and regulation of the department not

promulgated until nearly a year after the date of its alleged offense, constitutes a violation of the due process clause of the 5th and 14th Amendments.

Statement

On December 6, 1963, the petitioner, Capt. Richard W. Croughan, of the New York City Police Department, was served with twelve charges and specifications of alleged misconduct as a police officer. One month later he was served with five additional specifications. At the police department trial, which dismissed him from the force after a brilliant 16-year career with the attendant loss of pension and retirement benefits, all the seventeen charges and specifications were consolidated.

The alleged misconduct is, on the whole, repetitive, and a multiplication of the offenses, essentially accusing the petitioner of violating the rules and procedures of the Police Department, and generally charging the following classes of misconduct: "Moonlighting", that is, engaging while off duty as a part time law clerk and subsequently as a lawyer; conduct "which would tend to bring adverse criticism" on the Department in that he practiced law while a police officer and conflict of interest by maintaining a lawyer-client relationship with other members of the Police Department. Rules and regulations of the Police Department were cited in each case as having been violated.

One extremely serious additional charge was also alleged —the solicitation of legal business. There was no specific rule or regulation proscribing such conduct so it was charged under the catch-all charge as further conduct which would tend to bring adverse criticism on the Department.

Since the charge of solicitation was the allegation of very serious crimes, violations of the New York Penal Law, Sections 270 *et seq.* (at that time), and of the Judiciary Law, Section 90, against a man who, as a lawyer was

an officer of the Court and as a Police officer was rated the number one Captain of the Police Force in his division (1B)*, he demanded that the matter be turned over to the District Attorney for presentment to the Grand Jury (1B, 1C).

The entire matter was turned over to the District Attorney of Queens County and the Police Trial Commissioner adjourned the departmental trial from time to time (1L, 1M, 1P, 1R, 1S) stating "until a disposition of the matter by the District Attorney of Queens County, we'll hold that matter in abeyance" (1L).

The petitioner wrote a letter to the Grand Jury volunteering to testify (1P) but he was never called and no indictment was ever returned by the Grand Jury of Queens County. The departmental trial finally commenced almost four months later (19).

As a result of the departmental trial petitioner was found guilty of eleven of the specifications but was found not guilty of all the specifications of solicitation charged (See Appendix A). Except in one instance the findings of guilt of the Trial Commissioner constitute nothing more than "moonlighting" in the outside off-duty practice of law, although restated in several fashions.

The one finding constituting the exception is of critical importance. That was a finding of guilt of the solicitation of legal business. This was not one of the solicitations originally charged. This solicitation was never pleaded, never charged, never incorporated in the bill of particulars served on petitioner and never added by way of amendment at the trial.

Of the original specifications, two (No. 4 and No. 6) charged the petitioner with the crime of solicitation. Pe-

---

* Unless otherwise noted the numbers in parentheses are references to the pages of the transcript of the hearing before the Police Trial Commissioner.

titioner demanded that respondent amplify his charges by citing the instances wherein petitioner solicited such legal business. Respondent served a bill of particulars in which he charged 12 instances of alleged solicitation. The entire matter was turned over to the District Attorney of Queens County. No indictment was ever returned and petitioner was specifically found not guilty of solicitation in these 12 instances at the departmental trial.

Specification 8 charged petitioner with conflict of interest in violation of the rules and regulations of the Police Department but not with the crime of solicitation. In No. 8 petitioner was charged with having investigated, in his departmental capacity, an accident in which a Patrolman Timothy Sullivan was involved. The conflict of interest charged is that at the same time that he made administrative departmental recommendations and determinations, the law firm he was associated with was also retained by Sullivan to pursue the civil liability aspects of the accident. This is not a charge of having solicited the case.

While Sullivan was testifying at the hearing, some four months after the Police Department had completed the investigation of the basic facts giving rise to the charges and had formulated the charges without charging the Sullivan case as a solicitation, the trial prosecutor for the first time decided that he wanted to amend the bill of particulars to allege the Sullivan matter as a solicitation (588). At that point in the hearing the following colloquy occurred between the trial prosecutor and the trial commissioner (588):

> "Dep. Com. Melia: I am denying the motion to amend the Bill of Particulars. I am granting the motion to amend the specifications. [This specification amendment was as to dates only, not substantive matter.].
>
> Mr. Geisler: The Bill of Particulars is—necessarily limits our proof.

Dep. Com. Melia: Right.

Mr. Geisler: So if we don't have the bill of particulars amended then we would be unable to submit this as proof of the charges."

Thus the addition of the Sullivan matter as a solicitation charge was rejected at the departmental hearing. Defense counsel for the petitioner necessarily conducted himself thereafter as if this charge was not in the case, for indeed it wasn't. It was not originally charged and its addition by way of amendment was rejected.

Nevertheless this is the single finding of guilty of anything of a criminal or serious nature which served as the basis for petitioner's dismissal as a result of the departmental trial. The other guilty findings were nothing more than some aspect of "moonlighting."

Petitioner was also found guilty under Specification 8, of Conflict of Interest in violation of paragraph 35.00 of Chapter 2 of the Rules and Procedures of the Department. The time delineation of this charge is clearly alleged as "from about August, 1961 to November 1961 while a Captain of this Department and assigned to the 17th Division."

But paragraph 35.00 of Chapter 2 of the Rules and Procedures was not in effect at the time of its alleged violation. This Rule was not promulgated as binding on members of the police force until the issuance of General Order No. 22 of the Department on June 8, 1962.

Thus this finding of guilt of conflict of interest upon which petitioner's dismssal is also based was the violation of a Rule not promulgated until at least seven months after its alleged violation.

The recommendation of the Trial Commissioner was dismissal from the Department. This dismissal was ordered by the Police Commissioner. The Supreme Court,

Appellate Division, Second Judicial Department confirmed the dismissal in an order rendered without written opinion. A motion for leave to appeal to the Court of Appeals of New York State was denied on April 10, 1969. The matters and issues raised herein were raised in the Courts and proceedings in New York State. Petitioner has now exhausted any available remedy in New York State Courts.

Reasons for Granting the Writ

1. The decision below is believed to be erroneous and appears to conflict with the decision of this Court in *Re Ruffalo*, 390 U. S. 544, 20 L. Ed. 2d 117, reh. den. 391 U. S. 961, 20 L. Ed. 2d 874 (1968).

In the cited case of *Re Ruffalo, supra,* the petitioner, a trial lawyer, was brought before the Ohio Board of Bar Commissioners on Grievances and Discipline. He was charged with the misconduct of soliciting legal business through an agent named Orlando. After Orlando had testified on the solicitation charge, the charge of misconduct was changed from solicitation to a charge of misconduct for the hiring of Orlando, a railroad car inspector, to investigate FELA claims against Orlando's employer. This charge was not in the original charges but was added only after Orlando testified. Although petitioner was granted a continuance in order to have time to respond to the new charge, his motion to strike the charge was denied.

Ruffalo was suspended from practice in Ohio on the basis of this added charge and other misconduct (*Mahoning County Bar Assn.* v. *Ruffalo,* 176 Ohio St., 263, 199 N. E. 2d 396). That order became final and was not reviewed by this Court.

However, the proceedings to disbar Ruffalo from practice in the Federal Courts on the original record of the State proceedings reached this Court and this Court reversed

because of the added charge on the specific ground that: (390 U. S. at 552, 20 L. Ed. 2d at 123.)

> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

In the instant case, petitioner, a lawyer and policeman, was brought before the Trial Commissioner of the Police Department of the City of New York. He was charged with the misconduct of conflict of interest because while making departmental recommendations as a police superior concerning a personal injury received by a police officer named Sullivan, the law firm he was associated with was also retained to pursue the civil liability aspects of the accident. After Sullivan testified on the conflict of interest charge, an attempt was made by the trial prosecutor to change the charge of misconduct from specification conflict of interest to a charge of the solicitation of legal business. This specification was not in the original charges but the attempt to change the original charges to include this as a solicitation was made only after Sullivan had testified.

Although the motion to amend the bill of particulars to add the Sullivan Matter as a specification of solicitation was denied by the Trial Commissioner, petitioner was nevertheless found guilty of this solicitation in the Sullivan Matter.

In the instant case, it was argued below that the *Ruffalo* decision was not binding since petitioner here had a copy of a pre-trial statement of Patrolman Sullivan which should have indicated to petitioner that such a statement could have given rise to a charge of solicitation. Apparently such a theory was accepted by the New York Courts. A study of the record on appeal of the *Ruffalo* case in this Court, and particularly the Petition for Rehearing, negates such an argument. In *Ruffalo* the charge was added on the third day of hearings which did not close until some eight

months later. Ruffalo was assured of whatever time he might wish for an answer (Pet. for Reh. p. 2). Ruffalo had absolute advance notice of the charges against him as they were the exact same as in the disbarment proceedings before the Supreme Court of Ohio in *Mahoning County Bar Association* v. *Ruffalo,* 1964, 176 Ohio St. 263, 199 N. E. 2d 396, cert. den. 379 U. S. 931 (1964).

How more flagrant a violation of petitioner's constitutional rights is this case when compared with *Ruffalo!* Here the charge was only attempted to be added during the middle of a week-long hearing some 4 months after the Police Department had the facts upon which they formulated all the charges. Here the motion to add the charge was denied, so petitioner was not advised that he had to defend against it; but nevertheless he was found guilty of it. Thus, petitioner was not only given no advance warning of the charge; when it finally arose he was assured he would not have to defend against it once its addition by amendment was denied.

It is submitted that since there was such a lack of fair notice as to the reach of the departmental trial and the precise nature of the charges, petitioner was deprived of procedural due process.

2. Since the questions of solicitations were turned over to the District Attorney of Queens County for presentment to the grand jury and no indictment ever issued, was not the Police Departmental trial thereafter restricted from adjudicating the solicitation issue?

Solicitation was both a crime cognizable under the Penal Code of New York State and a misconduct offense for a lawyer under the Judiciary Law of the State of New York.

Here the matter was turned over to the District Attorney and no prosecution was commenced. It was public knowledge, in fact the Judicial Inquiry into Attorneys had copies of the transcripts, and disciplinary proceedings were not commenced.

It is submitted that the proper forum to have adjudicated the issues of solicitation of legal business was either the Criminal Courts of New York or the Grievance machinery of the Bar of New York State. Both these agencies had the opportunity to act but did not. It seems to be fundamental, under the circumstances, that the solicitation questions were then beyond the reach of the Police Department Trial Commissioner.

In *O'Callahan* v. *Parker,* No. 646—October Term, 1968, decided June 2, 1969, this Court granted certiorari, to determine whether the exercise of jurisdiction by a military court-martial, concerning a charge cognizable in the civilian courts, deprived the petitioner "of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" (393 U. S. at 822)

On appeal this Court answered that question in the affirmative. It is submitted that the principle of *O'Callahan* v. *Parker, supra,* should be extended to the departmental trials of the Police Department of New York City. This is particularly so when it is considered that the solcitation matters were turned over to the District Attorney of Queens County for grand jury action, and no indictment was ever returned.

Was not the action of the Police Department thereafter, to try him for solicitation under some catch-all charge of conduct prejudicial to the department, a deprivation of petitioner's constitutional rights to indictment by a grand jury and trial by a petit jury?

Settlement of this question by this Court is plainly in the public interest.

3. The finding that petitioner had violated a Rule and Regulation of the Police Department which was not promulgated until nearly a year after the alleged commission of the offense violates the due process clause of the 5th and 14th Amendments.

A rule of the Police Department proscribing certain conduct must give "fair warning" of the conduct that it prohibits or proscribes. (*U. S.* v. *Harriss*, 347 U. S. 612 (1954).) A police officer cannot be held responsible for the violation of a rule of the Department which was not in effect at the time he is claimed to have violated it.

On June 8, 1962, the Rules and Procedures of the New York City Police Department were for the first time amended to add R. & P. 2/35.00.

Petitioner is found guilty of violating R. & P. 2/35.00 some seven months earlier.

Respondent has not disputed this assigned error in the New York State Courts. By not meeting and disputing this issue respondent should be deemed to be conceding it. Nevertheless, it has either been ignored or overlooked by the New York Courts.

The prohibition against such practices by the Police Department of the City of New York that would come about by a reversal in this case is clearly in the public interest since these practices are likely to continue if not checked in this case.

4. The dismissal of petitioner from the Police Force was an unconstitutional selective enforcement of an administrative regulation.

The isolated finding of solicitation must have weighed most heavily in the fixation of petitioner's drastic punishment—dismissal—for without it, all that remains against petitioner is moonlighting. And never in the long history of the Police Department of New York City has any member of the force been dismissed for off duty moonlighting. Significant also is the fact that off duty moonlighting is now generally allowed as the public policy of New York (Section 208-d, General Municipal Law of New York; Ch. 812 of the Laws of 1967, New York).

Contemporaneous with the case of petitioner were four other similar cases involving a police officer-lawyer charged with practicing law in off duty hours, including the charge of handling matters for other policemen. (See, e.g., *Matter of Fendel,* 25 A. D. 2d 733 (First Dept. 1966).)

Each of these four other cases was punished by a 30 day suspension without pay. The petitioner herein was dismissed.

Matter of Fendel, supra, involved precisely the same charges as alleged against petitioner. Similarly, there was a single finding of guilty of solicitation, but this was reversed by the First Department, Appellate Division of the New York Supreme Court. Thereafter, on the exact same remaining charges, both qualitatively and quantitatively as are here, *Fendel* was punished with a 30 day suspension.

To avoid any speculation that the charges here might have interfered to a greater degree with petitioner's professional performance, than in the other cases cited, petitioner requested and received the stipulation from the trial prosecution that there was (744):

> "No evidence offered in this case of any specific acts or omissions of inefficiency on the part of Captain Croughan."

In *Cox* v. *Louisiana,* 379 U. S. 536, 557-8 (1965), this Court pointed out that:

> "It is clearly unconstitutional to enable a public official to . . . engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute."

As no one has ever been dismissed from the New York City Police Department who was found guilty of or pleaded

guilty to charges of a similar nature as petitioner is found guilty of here, his dismissal is an abuse of discretion and the improper, illegal and unconstitutional selective enforcement of a statute, which should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DENIS M. HURLEY,
Counsel for Petitioner.

JOHN F. HAGGERTY,
of Counsel.

Dated: Brooklyn, N. Y., July 3, 1969.

APPENDIX A

POLICE DEPARTMENT
CITY OF NEW YORK

FINAL ORDER OF DISMISSAL

Cases #35873, #35984.

May 18, 1964.

In the Matter of Charges Against CAPTAIN RICHARD W. CROUGHAN, #83102, Patrol Borough Bklyn. North, of the Police Force, Police Department, City of New York.

Upon reading and filing certain written charges in this matter, wherein he is charged with VIOLATION OF RULES AND PROCEDURES, dated December 5th, 1963, and January 17th, 1964, duly made and preferred in the form and manner prescribed by law and the rules and procedures of the said Police Department by Inspector Sidney Cooper, P.C.C.I.U., against the said CAPTAIN RICHARD W. CROUGHAN, a member of the police force of said city, and it having been duly proved that a copy of such charges, together with a written notice that the same had been made and preferred against him, the said CAPTAIN RICHARD W. CROUGHAN, requiring him to appear and answer thereto at a proper time and place named in said notice, has been duly served upon him, the said CAPTAIN RICHARD W. CROUGHAN, in the manner required by law and the said rules and procedures; and he, the said CAPTAIN RICHARD W. CROUGHAN, having appeared and answered at the time and place mentioned and required by said notice, and the said charges having been duly brought to a hearing, and duly tried, heard, publicly examined and investigated, in the manner required by law and the rules and procedures of the said Police Department, before HON. ALOYSIUS J. MELIA, Deputy Police Commissioner, on the 16th day of December, 1963, and the 14th and 20th days of January, the 3rd day of February, and

the 4th, 5th, 6th, 10th, 11th, and 13th days of March, 1964, and a full opportunity having been afforded to the said CAPTAIN RICHARD W. CROUGHAN, to be heard in his defense, and the proofs and allegations in relation to said charges having been duly taken, and recorded as required by law, and the said rules and procedures, and the determination of said charges, based upon the entire record adduced at the hearing, and the findings and recommendations made thereon, having been referred to the Police Commissioner, the Police Commissioner, upon due consideration, and review of said findings and recommendations, and upon inquiry of and consultation with said Trial Commissioner, adjudges the said CAPTAIN RICHARD W. CROUGHAN, to be GUILTY, of the Charges, and GUILTY of specifications 1, 2, 3, 4, 5, and GUILTY, of specification 6, except NOT GUILTY of solicitation, GUILTY, of specifications 7, and 8, NOT GUILTY, of specifications 9, 10, 11, 12, and 13, GUILTY of specifications 14, and 15, and GUILTY of specification 16, except NOT GUILTY of receiving compensation, NOT GUILTY, of specification 17, and does convict him of specifications 1, 2, 3, 4, 5, and of 6, except not guilty of solicitation and does convict him of specifications 7, 8, 14, 15, and of 16, except NOT GUILTY of receiving compensation, and upon such conviction, adjudges and determines that he, the said CAPTAIN RICHARD W. CROUGHAN, be, and he hereby is, DISMISSED from the Police Force, Police Department, City of New York.

MICHAEL J. MURPHY,
Police Commissioner.

APPENDIX B

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 27, 1969.

HON. ARTHUR D. BRENNAN,
Acting Presiding Justice.
HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
HON. A. DAVID BENJAMIN,
HON. M. HENRY MARTUSCELLO,
Associate Justices.

ORDER DISMISSING PROCEEDING

In the Matter of

RICHARD W. CROUGHAN,

Petitioner,

v.

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

A proceeding having been instituted by the above named Richard W. Croughan, petitioner, by petition verified September 15, 1964, to annul determination of respondent dated May 18, 1964; by order of the Supreme Court, Queens County, dated July 23, 1965 the proceeding having been transferred to this court for determination; and the proceeding having been argued by John F. Haggerty, Esq., of counsel for petitioner and by Edmund D. Hennefeld,

Esq., of counsel for respondent; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that respondent's determination, dated May 18, 1964 is hereby unanimously confirmed, without costs; and proceeding dismissed on the merits.

Enter:

HERMAN M. POGUL,
Clerk of the Appellate Division.

APPENDIX C

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of April A. D. 1969.

Present, HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 374

In the Matter of

the Petition of RICHARD W. CROUGHAN,

Appellant,

For a Judgment &c.,

vs.

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

CARSON KIMBALL,
Deputy Clerk.

(SEAL)

LIBRARY
SUPREME COURT, U. S.

(39475)

Office-Supreme Court, U.S.
FILED
AUG 1 91969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 319

RICHARD W. CROUGHAN,

Petitioner,

against

MICHAEL J. MURPHY, Police Commissioner of The City of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. LEE RANKIN,
Corporation Counsel,
Attorney for Respondent,
Municipal Building,
New York, New York 10007.

STANLEY BUCHSBAUM,
EDMUND B. HENNEFELD,
of Counsel.

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Facts	2
The 11 specifications of charge as to which petitioner was found guilty, and the admissions and proof pertaining to same	2
Specification 1	2
Specification 2	2
Specification 3	3
Specification 4	3
Specification 5	4
Specification 6	5
Specification 7	6
Specification 8	6
Specification 14	7
Specification 15	7
Specification 16	7
Specifications 9, 10, 11, 12, 13 and 17	8
POINT I—The decision below was not erroneous in any way, and specifically was not in conflict with this Court's decision in *In Re Ruffalo*, 390 U. S. 544 (1968)	8
POINT II—The decision below was not erroneous or in conflict with *O'Callahan* v. *Parker*, 395 U. S. 258 (1969)	10

PAGE

POINT III—The claim that petitioner was found to have violated a Rule and Regulation not promulgated until nearly a year after the alleged comission of the offense, and that the Due Process clause of the Federal Constitution was accordingly violated, is without merit 11

POINT IV—There is no merit in petitioner's claim that his dismissal was an unconstitutional selective enforcement of an administrative regulation. *Cox* v. *Louisiana*, 379 U. S. 536 (1965), is inapplicable 13

Conclusion 13

TABLE OF AUTHORITIES

Cases:

In re Ruffalo, 390 U. S. 544 (1968) 8, 9, 10

O'Callahan v. *Parker*, 395 U. S. 258 (1969) 10

Cox v. *Louisiana*, 379 U. S. 536 (1965) 13

Statutes

Administrative Code of the City of New York

Section 1106-1.0 12

Section 898-1.0 of former Administrative Code of the City of New York 12

Local Law of the City of New York, No. 73 (1959) 12

Administrative Regulations

Rules and Procedures of the New York City Police Department

Rule 2/24.0 12

Rule 2/35.0 11

Rule 2/47.0 12

Rule 2/63.2 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 319

RICHARD W. CROUGHAN,

Petitioner,

against

MICHAEL J. MURPHY, Police Commissioner of The City of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The petition is for a writ of certiorari to review an order of the Appellate Division, Second Department, entered January 27, 1969, which confirmed a determination of the Police Commissioner of the City of New York, made on May 18, 1964, dismissing petitioner from the City Police Department. The New York Court of Appeals denied leave to appeal.

Facts

On December 6, 1963, the city Police Department served on petitioner 12 charges, and on January 17, 1964, an additional 5 charges, a total of 17 charges in all.

To all 17 charges petitioner initially pleaded not guilty, but on February 28, 1968, made voluntary admission of the truth of most of the charges. That admission was contained in a writing prepared by his attorneys and entitled, "Admission of Facts."

At the hearings, extensive testimony was taken and documentary evidence introduced to cover the portions of the charges not admitted. Thereafter, the Trial Commissioner rendered his written report in which he recommended, based on 11 charges as to which he found petitioner guilty, that petitioner be dismissed from the Department. The respondent Police Commissioner adopted the Trial Commissioner's findings and recommendations and on May 18, 1964, made his final order of dismissal.

The 11 specifications of charge as to which petitioner was found guility, and the admissions and proof pertaining to same

Specification 1

This charged that petitioner, from about July, 1961 to about April 5, 1962, while a member of the force, engaged in another occupation, namely, that he was employed as a law clerk in the firm of Di Gennaro and Pelle, 52-40 Merrick Road, Massapequa, New York.

This charge was in substance admitted by petitioner (Admission of Facts, par. 1).

Specification 2

This charged that petitioner, from about April 23, 1962 to about March 12, 1963, while a member of the force, was

retained and employed as an attorney by various persons in connection with personal injury matters, as shown in particular lawyer-client retainer statements on file with the Judicial Conference in his name as attorney.

This charge was also in substance admitted (Adm., par. 2).

Specification 3

This charged that petitioner, from about November 12, 1962, to about September 24, 1963, while a member of the force, was an active member in the law firm containing his name in the title, Di Gennaro, Pelle and Croughan, 52-40 Merrick Road, Massapequa, New York.

This was substantially admitted (Adm., par. 3). Over all, from July 1961 to September 1963, petitioner brought or referred to the firm 82 or 83 cases (167-168).*

Specification 4

This charged that petitioner, from about December 31, 1961, to about September 1962, solicited and accepted legal business from members of the force under his supervision.

The admission was to the effect that during the period in question petitioner referred to the Di Gennaro firm named members of the police force; also that petitioner was personally retained as attorney by other named members of the force. In addition to the persons covered by petitioner's own admissions, the proof at the departmental hearing showed that petitioner, at a time when he was Supervisor of Patrol for the Borough of Queens and had the responsibility to supervise the patrol activities of every member of the force in the Borough of Queens, accepted

* All number references unless otherwise indicated are to pages of transcript of hearing before the Police Commissioner.

retainers from additional named members of the force in the Borough of Queens.

With respect to another member of the police force, Patrolman Timothy Sullivan, the Trial Commissioner in his report found, not only that legal business was accepted from him, but that petitioner solicited the case from him.

Petitioner in his present petition has singled out this case for special, extended treatment. Therefore, we will do the same:

Sullivan was injured while on his motorcycle on August 7, 1961 (177-178). He got in touch with his Command and was told to notify the 112th Precinct, which included the area where he had been injured (179). He went to the 112th Precinct station house and there was interviewed by petitioner (179). He had not known petitioner before, nor even heard of him (179).

Petitioner and Sullivan discussed the case from the standpoint of how the injury had occurred (179-180). Petitioner then told Sullivan that he had what appeared to be a good accident case (181). Petitioner at the same time mentioned that he was employed by a law firm (181). Petitioner told Sullivan that he was an attorney and that, if Sullivan so desired, he, petitioner, would handle the case for him (189).

Sullivan thereafter signed a retainer agreement at the offices of Di Gennaro and Pelle on August 28, 1961, which was the day after the accident (189-190). Petitioner himself was present at the offices of Di Gennaro & Pelle at the time of the signing (191). Petitioner at the time represented to Sullivan that he was an attorney (194), though in fact he was not admitted to the Bar until April 1962 (778).

Specification 5

This charged that petitioner, from about July 5, 1962, to about August 20, 1962, while a Captain and assigned

as Supervisor of Patrol in the Borough of Queens, filed statements of contingency retainer and compensation in his own name in the Judicial Conference, the instances being the same ones referred to in Specification 4, and the clients being, therefore, members of the force under his supervision.

Petitioner's admissions covered several instances of this, one in connection with Patrolman Anthony Palmese, attached to the 108th Precinct in the Borough of Queens and, therefore, under the supervision of petitioner as Supervisor of Patrol in that Borough (388, 394-395, 412). Palmese testified that, after he had come out of the hospital following an automobile accident on August 16, 1962, petitioner called Palmese to say he had some papers for Palmese to sign, and then came to see him (391-392). Palmese testified he had never met petitioner before (394), contradicting petitioner's assertion in the retainer statement he had filed with the Judicial Conference that he had known Palmese personally for over a year (395).

Specification 6

This charged that petitioner, from September 1962 to about August 1963, while a Captain and Commanding Officer of the 114th Precinct, Queens, "did solicit and accept legal business from members of the Force under his supervision".

The admission with respect to this Specification 6 was limited to the fact that Di Gennaro, Pelle & Croughan were retained as attorneys "by the following members of the Force or their wives, or both, said members of the force being under respondent's (i.e., petitioner's) supervision", followed by the listing of the names. The Police Commissioner found petitioner guilty under this Specification of having accepted the legal business from members of the Force under his supervision, but not of the solicitation (Order of Dism., App. A to Pet.).

Specification 7

This charged that petitioner, from about September 1962 to about August 1963, while a Captain and Commanding Officer of the 114th Precinct, recommended members of the force under his supervision to the law firm of Di Gennaro, Pelle and Croughan, of which he was a member and partner, and that firm subsequently filed contingency retainer statements with respect to such clients.

This specification was admitted, except for petitioner's attempted qualification that he was only a "special or limited partner" in the firm (Adm., par. 7).

Specification 8

This charged that petitioner, from about August 1961 to about November 1961, while a Captain and assigned to the 17th Division, had the responsibility, among his other duties, to investigate and determine whether injuries sustained by members of the force under his supervision occurred in the line of duty and, if so, whether those members of the force were free from negligence; that, while serving in this capacity and having these responsibilities, petitioner recommended to members of the force so injured that they retain the firm of Di Gennaro and Pelle in their personal injury actions; that at the time petitioner was employed as a clerk by that firm; and that thereafter those members of the force did retain that firm.

This charge, to the extent embraced in the above summary, was substantially admitted by petitioner. The admission covered specifically Patrolman Sullivan, previously referred to, and two other patrolmen, namely, Moneypenny and Lizzel. Patrolman Moneypenny testified that he and Lizzel were injured in an automobile accident on November 7, 1961, while on duty (207-208). On the following day, petitioner, who was Supervisor of Patrol in the 17th Division, came to the hospital where they were confined to investigate the accident (208-214). As a result of subsequent conversations between petitioner and the two injured

patrolmen, they both retained the firm of Di Gennaro and Pelle on petitioner's recommendation (215-217).

Specification 14

This charged that petitioner, between June 1962 and September 1962, while a member of the force, was engaged as a lawyer by a particular named patrolman and handled certain transactions for him for which he was paid.

The charge in question was substantially admitted (Adm. par. 2).

Specification 15

This charged that petitioner, between September 1962 and October 25, 1963, while a Captain and assigned as Commanding Officer of the 114th Precinct, used the Department property and building (114th Precinct House) for other than police business or official department purpose.

In support of this specification, it was proved that petitioner had used the police station and telephones for conversations connected with legal matters as to which he or his firm had been retained by members of the force or their wives (226-227; 306; 467-468; 479-480; 486-487; 495-496; 567-569).

Specification 16

This charged that petitioner, between January 1962 and July 1963, while a Captain, was engaged as an attorney by one, Lieutenant Graham, 11th Division, and handled certain transactions for him, for which he was paid.

This was substantially admitted, although it was claimed that payment was to the firm and not to petitioner personally.

The Police Commissioner found petitioner guilty as charged, except not of receiving the compensation.

Specifications 9, 10, 11, 12, 13 and 17

The Police Commissioner, following the Trial Commissioner, found petitioner not guilty under these specifications. Therefore, they need not concern us.

POINT I

The decision below was not erroneous in any way, and specifically was not in conflict with this Court's decision in *In Re Ruffalo*, 390 U. S. 544 (1968).

On the present petition, petitioner relies heavily on *In re Ruffalo*, 390 U. S. 544 (1968). The majority in that case held that it was a denial of due process in a disbarment proceeding to add a charge during the course of that proceeding based on testimony given by the attorney while testifying. Emphasized was that the attorney, charged with having employed a railroad employee named Orlando to investigate cases against the railroad for him, had not been put on notice prior to the time that he and Orlando testified that his employment of Orlando under the circumstances would be considered a disbarment offense. Stressed additionally was that, by delaying the charge until after the proceeding had commenced, the attorney was, in effect, entrapped (p. 551). In a footnote it was pointed out that the absence of this charge lulled the attorney into giving testimony as rebuttal to other charges which testimony was then turned into the basis for the new charge (*id.*, fn. 4).

It is noteworthy that two of the Justices who concurred in the result reached the conclusion that the conduct involved in the additional charge was such that reasonable men might differ as to its impropriety (390 U. S. at pp. 555-556). While the majority did not adopt this view, its description of the conduct (pp. 547-548) indicates that the conduct was of such a nature that, at the least, it was a clear case of impropriety.

The *Ruffalo* case does not aid the petitioner herein unless it be treated as holding that a charge may never, regardless of the circumstances, be amended during a hearing. It is submitted that the principle of *Ruffalo* does not apply to a situation where the person charged is not only aware by its very nature of the impropriety of the act but also has been charged in a somewhat similar respect with the very act in question, so that there is in no sense a trap or a lulling into a false sense of security.

That is what occurred in the present case. The petitioner was specifically charged with the solicitation of legal business under Specification 4. In the bill of particulars under this Specification 4, the Sullivan matter was not included. But under Specification 8, petitioner was charged with placing himself in a position where his private interests conflicted with his official police duties when he recommended to injured members of the force under his supervision "that they use the legal services of the law firm of DiGennaro and Pelle", that the law firm did subsequently represent these members, and that petitioner arranged to receive a portion of the sum recovered at a time when he was employed by the law firm as a law clerk. The Sullivan matter was specifically included in the bill of particulars under this charge.

Specification 8, under which the Sullivan instance was listed, did not use the word "solicitation". But the acts charged—while having the responsibility to investigate injuries to members of the force under petitioner's supervision to determine both their line-of-duty character and the members' freedom from negligence, recommending to those members of the force that they retain the firm of attorneys by which petitioner was employed to handle their personal injury actions—included everything that would constitute solicitation, and more.

The petitioner here was charged specifically with solicitation and he was charged specifically with acts in relation to Sullivan in every way the equivalent of solicitation.

It may be argued that, despite the reasoning of the majority opinion in *Ruffalo,* it stands for the principle that charges may never be amended after they are served and the proceeding commences. To contend so, however, would be to fail to heed the warning, given by Judge CARDOZO under other circumstances, that one should be wary of carrying a principle to "a drily logical conclusion." Fair play was violated in *Ruffalo.* Fair play was not violated in the present case.

POINT II

The decision below was not erroneous or in conflict with *O'Callahan* v. *Parker,* 395 U. S. 258 (1969).

Petitioner contends that, because solicitation of legal business is both a crime under the New York State Penal Law and constitutes misconduct for a lawyer under the New York State Judiciary Law and because petitioner was not subjected to criminal prosecution or proceedings to disbar or suspend him as a lawyer, the solicitation questions were "beyond the reach of the Police Department Police Commissioner" (Pet., p. 10).

However, there is not and never has been such a ground of contention cognizable in the cases. The Police Commissioner had the interests of his own Department to safeguard. If petitioner in his capacity of police officer were guilty of one or more offenses sufficient to justify dismissal, the mere fact he has not been punished criminally or in his capacity of attorney did not confer upon him immunity from disciplinary action by his own Department with respect specifically to his departmental misconduct.

O'Callahan v. *Parker,* 395 U. S. 258 (1969), involving a question as between military and civil jurisdiction in a situation of attempted rape by a soldier while on pass, holds nothing to the contrary.

POINT III

The claim that petitioner was found to have violated a Rule and Regulation not promulgated until nearly a year after the alleged commission of the offense, and that the Due Process clause of the Federal Constitution was accordingly violated, is without merit.

The rule petitioner cites in this connection is R. & P. 2/35.0 of the Rules and Procedures of the New York City Police Department. That rule, so far as here pertinent, reads as follows:

> "2/35.0 The city Code of Ethics provides that a member of the department shall not:
>
> a. Engage in any business or transaction or have a financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his official duties.
>
> * * *
>
> h. Engage in or accept private employment or render services for private interests when such employment or service is incompatible with the proper discharge of his official duties.
>
> i. Solicit, negotiate for, or promise to, accept employment, by any person, firm or corporation with which he or the Police Department is engaged on behalf of the city in the transaction of business or which is or may be affected by his official action.
>
> The provisions of this paragraph, based on the Code of Ethics, shall apply to all members of the department except that where any portion of the subject matter appears in a more restrictive manner elsewhere in the Rules and Procedures or orders of the department, the more restrictive provisions shall apply to the

members so affected. (Example: 2/47.0 prohibiting members of the force from engaging in any occupation.)"

This rule, as it recites in its opening sentence and closing paragraph, does no more than carry over with specific reference to members of the police force what was already applicable to all city employees generally under the "city Code of Ethics". That Code had been in force at least as far back as 1959 (Administrative Code of the City of New York, Sect. 1106-1.0, formerly Administrative Code, Sect. 898-1.0; Local Law of the City of New York, No. 73 (1959).

Second, petitioner did not have to be forewarned by express regulation that it was unethical: (1) to engage in any business or transaction or have a financial or other private interest "in conflict with the proper discharge of his official duties", (2) to render services for private interests "incompatible with the proper discharge of his official duties", or (3) to solicit, negotiate or accept employment by any person "with whom he or the Police Department is engaged on behalf of the City in the transaction of business or which is or may be affected by his official action."

Petitioner's offenses, of which he was found guilty, are additionally the subject of specification and provision in Rules 2/24.0 and 2/63.2, barring respectively the recommendation of an attorney other than in personal affairs, and discreditable conduct generally such as would bring adverse criticism upon the Department. Therefore, were there the faintest ground for petitioner's line of contention in this regard, that ground would be completely destroyed by the fact that Rule 2/35.0 was at most surplusage and a repetition of what was already the subject of formulation and provision in Rules 2/24 and 2/63.2.

POINT IV

There is no merit in petitioner's claim that his dismissal was an unconstitutional selective enforcement of an administrative regulation. *Cox* v. *Louisiana*, 379 U. S. 536 (1965), is inapplicable.

Petitioner claims a selective enforcement of the administrative regulations and cites in his petition (pp. 11-12) four supposedly "similar" cases involving police officers who were also lawyers. There is nothing in the record concerning those other disciplinary cases. In the Appellate Division, when the same contention was advanced, respondent was able to satisfy the Court by going outside the record in response to its inquiry, that those other cases differed in all main particulars from the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 18, 1969.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel,
Attorney for Respondent.

Stanley Buchsbaum,
Edmund B. Hennefeld,
of Counsel.

FILED
SEP 18 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 319

RICHARD W. CROUGHAN,

Petitioner,

v.

MICHAEL J. MURPHY, Police Commissioner of the City of New York.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENIS M. HURLEY,
Counsel for Petitioner,
32 Court Street,
Brooklyn, N. Y. 11201.

JOHN F. HAGGERTY,
of Counsel.

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
POINT I—The 11 specifications of which petitioner was found guilty constitute nothing more than moonlighting	2
POINT II—The arguments advanced by respondent, in answer to the first reason presented in the petition for a writ of certiorari, do not pass constitutional muster	5
POINT III—Respondent has no valid answer to petitioner's claim that he was found to have violated a rule and regulation not promulgated until nearly a year after the alleged commission of the offense	7
Conclusion	11

CITATIONS

Cases:

Re Ruffalo, 390 U. S. 544 (1968)	3, 5, 6, 7
O'Callahan v. Parker, 395 U. S. 258 (1969)	10
Levy v. Parker, October Term, 1969	11

Statutes:

Administrative Code of the City of New York, Section 898-1.0	8, 9
Local Law No. 73 (Code of Ethics)	8
Local Law No. 75	8

Miscellaneous:

PAGE

General Orders No. 22 of the Police Commissioner of the Police Department of the City of New York.. 8, 9

Rules and Procedures of the New York City Police Department

Rule 2/24.0 .....8, 9, 10

Rule 2/35.0 .....7, 9, 10

Rule 2/63.2 .....8, 9, 10, 11

Rules of the Appellate Division, Second Department.. 3

In the

Supreme Court of the United States

OCTOBER TERM 1969

No. 319

Richard W. Croughan,

Petitioner,

v.

Michael J. Murphy, Police Commissioner of the City of New York.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Rather than controvert the merit of the constitutional issues raised by petitioner in his petition for certiorari, respondent instead has, in the main, resorted to an unneeded recital of the 11 specifications of moonlighting, which petitioner had already admitted, and which are not germane to the issuance of the writ. Apparently, respondent hopes that this restatement of the charges will somehow paint petitioner as a hardened offender and persuade this Court that he should not have relief for the clearly demonstrated violations of his constitutional rights. Whether such an evasive tactic be to avoid a confrontation on the real issues of this case or the result of a misunderstanding of the constitutional questions presented, it demands reply.

POINT I

The 11 specifications of which petitioner was found guilty constitute nothing more than moonlighting.

To counteract respondent's tactic and to demonstrate that the eleven specifications concerning which petitioner either admitted his guilt or was found guilty constitute nothing more than a basic charge of moonlighting as a lawyer, the same incidents stated and restated in every way imaginable, increasing the number of specifications in an attempt to increase its severity, we proceed to a succinct analysis of each.

Specification 1

Charged petitioner with being engaged in another occupation, namely, being employed as a law clerk. Petitioner admitted this.

Specification 2

Charged petitioner with being engaged in another occupation, namely, acting as an attorney. Petitioner admitted this.

Specification 3

Found that petitioner while engaged in this other occupation, namely, as an attorney, had his name in a firm title. This is no different in substance than the prior charges. He simply moonlighted as an attorney.

Specification 4

Charged petitioner with soliciting and accepting legal business. Petitioner was found guilty of accepting legal business but not guilty on all the specifications of solicitation. Thus this finding is nothing more than moonlighting.

Respondent's brief (pp. 3-4) refers to the *Sullivan* case as a finding of solicitation. As pointed out in the petition for a writ, this single finding of solicitation, was never charged, never specified and never added to the charges or specifications and the finding of solicitation in this case is thus in contravention of *Re Ruffalo,* 390 U. S. 544 (1968).

There is no important distinction between this specification and the previous ones because the clients here are described as other police officers. As petitioner himself was a police officer, most of his clients were fellow officers, and the clients referred to in all specifications are all one and the same. The same offense is alleged just a little differently.

Specification 5

Found that petitioner, as part of his engagement in another occupation, as an attorney, filed statements of retainers with the Judicial Conference on contingent fee cases. It must be noted that this is mandated by the Rules regulating lawyers in New York State (Rule IV, Part Three of the Rules of the Appellate Division, Second Department) and the act of filing these statements was in and of itself no violation of any rule and regulation of the Police Department, but only a further exhibition of petitioner's moonlighting as a lawyer. This charge is thus no different from the previous ones.

Conversely, if petitioner had failed to file these retainer statements to avoid Police Department scrutiny, he would have been subject to disciplinary action as a lawyer. But petitioner did not try to hide his moonlighting as a lawyer; yet one of his otherwise innocuous acts, the filing of retainers as required by law, becomes the subject of a separate specification. It should not have been alleged as a separate specification—the wrong committed by petitioner was singular, he moonlighted.

Specification 6

Charged petitioner with soliciting and accepting legal business. He was found guilty of accepting legal business but not soliciting. It is again simply another statement of the basic moonlighting charge.

Specification 7

Found that petitioner recommended other officers to the law firm with which he moonlighted. There is no substantive difference in this charge, just another way of stating the basic charge of moonlighting.

Specification 8

Found petitioner guilty of conflict of interest because of his moonlighting. This finding will be analyzed in depth in Point III of this brief.

Specification 14

Found petitioner guilty of getting paid for his moonlighting as a lawyer.

Specification 15

Charged petitioner with using Police Department property and buildings for other than official business, that is, he received a couple of telephone messages at the stationhouse from clients concerning his moonlighting cases.

Specification 16

Charged petitioner with moonlighting in one particular instance, for which the firm received a fee.

POINT II

The arguments advanced by respondent, in answer to the first reason presented in the petition for a writ of certiorari, do not pass constitutional muster.

The first reason for granting the writ stated by petitioner was that the single finding of solicitation of legal business (the *Sullivan* case) violated the mandate of this Court in *Re Ruffalo,* 390 U. S. 544 (1968). This was for the reason that the *Sullivan* case was never charged as solicitation, never specified, was not included in the Bill of Particulars, and was rejected at the hearing when the trial prosecutor attempted to add it as such (Petition, pp. 7-8).

Respondent's answer concedes this:

> "The petitioner was specifically charged with the solicitation of legal business under Specification 4. In the bill of particulars under this Specification 4, the Sullivan matter was not included. . . .
>
> "Specification 8, under which the Sullivan instance was listed, did not use the word 'solicitation'." (Respondent's Brief, p. 9)

Nevertheless, respondent advances three arguments why this single finding of solicitation was justified. First respondent argues that:

> "The *Ruffalo* case does not aid the petitioner herein unless it be treated as holding that a charge may never, regardless of the circumstances, be amended during the hearing." (Respondent's Brief, p. 9)
>
> * * * *
>
> "It may be argued that, despite the reasoning of the majority opinion in Ruffalo, it stands for the principle that charges may never be amended after they are served and the proceeding commences." (Respondent's Brief, p. 10)

This reasoning is specious. for it ignores the stark fact that not only was the charge not amended during the hearing to include the *Sullivan* case as solicitation, the attempt at such an amendment was specifically rejected by the hearing officer. The problem here is that the findings were somehow turned to include the *Sullivan* matter as a solicitation, although petitioner was specifically put on notice, by the denial of respondent's motion to amend the charge to include the *Sullivan* case as a solicitation, that he would not have to defend against it as such.

The second argument advanced by respondent can only be understood as urging the proposition that petitioner should have guessed he might have been charged with solicitation in the *Sullivan* case, although the charges, specifications and the Bill of Particulars served by respondent did not state it as such. Respondent justifies it this way:

> "It is submitted that the principle of *Ruffalo* does not apply to a situation where the person charged is not only aware by its very nature of the impropriety of the act but also has been *charged in a somewhat similar respect with the very act in question. . . .*" (Respondent's brief, p. 9) (emphasis added.)

How does this argument square with the decision of *Ruffalo?* The act with which *Ruffalo* was charged was solicitation, thus he was aware of its impropriety, and it was the proof offered on the solicitation charge that served as the basis for the constitutionally rejected finding against him, namely, that he hired the investigator of the railroad to investigate the FELA claims. He was thus charged in a somewhat similar respect with the very act in question.

It must be remembered that in the instant case the charges were served in December, after a prior investigation, and the hearing did not proceed until March. Dur-

ing all that time all the facts of the *Sullivan* matter were available to respondent and he did not consider it as a solicitation nor did he charge it as such. It was only for the first time at the hearing, after the witnesses on the matter had finished testifying as to the charge of conflict of interest (Specification 8), that the respondent chose to try to amend Specification 4 to include *Sullivan* as a solicitation charge. This was rejected by the hearing officer. Now that the hearing officer has erroneously incorporated it as his only finding of solicitation, respondent attempts to justify it with the argument that petitioner could have guessed it because he had "been charged in a *somewhat similar* respect with the very act in question. . . ."

Finally, respondent argues that *Ruffalo* was not violated because in his opinion: "Fair play was not violated in the present case." (Respondent's brief, p. 10). It is hard to imagine a situation more unfair than this, where petitioner was found guilty of a crime with which he was never charged. All notions of fair play were violated when petitioner was lulled into the position of not defending the *Sullivan* matter as a charge of solicitation and then finding himself declared guilty of that very offense.

POINT III

Respondent has no valid answer to petitioner's claim that he was found to have violated a rule and regulation not promulgated until nearly a year after the alleged commission of the offense.

Respondent concedes in his brief (pp. 11-12) that R. & P. 2/35.0 of the Rules and Regulations of the New York City Police Department was not promulgated until nearly a year after its alleged violation. But respondent argues that this is unimportant because this Rule and Regulation was only "at most surplusage and a repetition of what

was already the subject of formulation and provision in Rules 2/24 and 2/63.2." (Respondent's brief, p. 12). Respondent further argues that petitioner could have been otherwise found guilty of a penal offense under the New York City Code of Ethics (Section 898-1.0 of former Administrative Code of the City of New York) which was in effect at that time (Respondent's brief, p. 12).

Beside the very basic fact that petitioner was not charged with a violation of the Administrative Code of New York City (The Code of Ethics), which would raise further questions never considered at the hearing, including the issue of quantum of proof, it is even questionable whether the Police Department itself considered its members covered by the Code until the publication of General Orders No. 22, on June 8, 1962. In his brief, respondent has set forth the portions of General Orders No. 22 that became incorporated in the Rules and Procedure of the Department as a result of the order. However, respondent neglected to set out the introductory matter of General Orders No. 22 of June 8, 1962, which clearly raises the question of whether or not the Police Commissioner considered the provisions of the Code of Ethics applicable prior to that time. The language of the Police Commissioner clearly delineates its application as prospective—"shall be applicable"—while here respondent argues its *ex post facto* application. The introductory paragraphs of General Orders No. 22 is set forth for this Court's convenience.

"POLICE DEPARTMENT
CITY OF NEW YORK
OFFICE OF THE POLICE COMMISSIONER

New York, June 8, 1962.

GENERAL ORDERS No. 22.

AMENDMENTS TO THE RULES AND PROCEDURES
CODE OF ETHICS

1. Due to its importance, the content of Local Law No. 73 (Code of Ethics) and Local Law No. 75, both

of 1959, heretofore published in Circular No. 4, s. 1960, is added to the Rules and Procedures. These provisions shall be applicable to all members of the department, except that when any portion of the subject matter appears in a more restrictive manner elsewhere in the Rules and Procedures or orders of the department the more restrictive provisions shall apply to members so affected.

2. Any member of the department who desires to resolve a question of propriety under the Code of Ethics shall submit a request for an opinion, in writing, to the Deputy Commissioner in charge of Legal Matters. An appeal from an opinion rendered may be taken by notice to the Deputy Commissioner in charge of Legal Matters. Upon receipt of notice of appeal, the Deputy Commissioner in charge of Legal Matters shall forward all relative papers to the Board of Ethics of the City of New York.

3. Accordingly, Chapter 2 of the Rules and Procedures is amended as follows:

a. Present paragraphs 35.0 and 36.0 are renumbered 36.0 and 36.1 respectively, and new paragraphs 35.0, 35.1 and 35.2 are added to read:"

If a violation of R. & P. 2/35.0 cannot be sustained because it was not promulgated until nearly a year after the alleged violation, and if a violation of the Administrative Code of New York City (The Code of Ethics) cannot be sustained because either it simply was not charged against petitioner, or it was not applicable until the promulgation of General Orders No. 22, then respondent is left with only one argument to sustain Specification 8, and that is found on page 12 of his brief:

". . . Rule 2/35.0 was at most surplusage and a repetition of what was already the subject of formulation and provision in Rules 2/24 and 2/63.2."

Clearly the gist of Specification 8 was a charge of violating R & P 2/35.0 which is concerned with conflict of interests. The wrong charged in specification 8 is

> ". . . did without just cause place himself in a position where his private interests did conflict with his official police duties, or by reason of which his loyalty to this Department and the City of New York could be impaired, . . ."

Rule 2/24.0, upon which respondent now relies, prohibits a member of the department *"except in transacting personal affairs"* from recommending to a *business person* or informing a *business person* about the services of a lawyer, bondsman, undertaker, towing service, etc. By its very terms Rule 2/24.0 is not applicable here as it exempts "personal affairs" and the very charge of Specification 8 is that petitioner allowed his "private interests" to conflict with his police duties. Rule 2/24.0 is mutually exclusive with R & P 2/35.0 and the very language of Specification 8. Additionally, it is submitted, that Rule 2/24.0 was never intended to cover the situation where one police officer recommends a service to another police officer. Its obvious intent is to proscribe such recommendation to a business person—in dealing with the general public.

Finally respondent relies on Rule 2/63.2. That rule reads as follows:

> "63/2 Members of the department shall carefully avoid behavior that would tend to bring adverse criticism of the department. Their conduct, whether on or off duty, shall be such as to merit the confidence and respect of the people."

Does this rule defining the behavior to be avoided as "that [which] would tend to bring adverse criticism of the department" satisfy constitutional standards against vagueness? In *O'Callahan* v. *Parker,* 395 U. S. 258 (1969),

this Court left open a similar question regarding Article 134 of the Uniform Code of Military Justice. That statute punishes as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Is there any constitutional difference between that statute and Rule 2/63.2, considered here, which punishes for failure to "carefully avoid behavior that would tend to bring adverse criticism on the department," or for failure to adhere to conduct "whether on or off duty [which], shall be such as to merit the confidence and respect of the people"?

As observed by Mr. Justice Douglas, in his memorandum opinion on the Application for Bail in *Levy* v. *Parker*, October Term, 1969, "substantial issues are presented on the merits."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DENIS M. HURLEY,
Counsel for Petitioner.

JOHN F. HAGGERTY,
of Counsel.

Dated: Brooklyn, New York, September 1, 1969.